Supreme Court, U.S.
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No. 02-1206

IN THE

Supreme Court of the United States

JOHN J. TIGUE, JR. and
MORVILLO, ABRAMOWITZ, GRAND,
IASON & SILBERBERG, P.C.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE
and INTERNAL REVENUE SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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ARGUMENT

In their brief in opposition to the petition for a writ of certiorari, respondents maintain that review is not warranted because the decision of the Court of Appeals in the instant case is correct and does not conflict with the decisions of this Court or of other courts of appeal. Respondents' Brief at 7. Each of respondents' arguments is without merit.

Respondents assert that the decision of the Court of Appeals for the Second Circuit in this case is correct while providing *no* support. Moreover, respondents fail even to address petitioners' argument that the Court of Appeals' application of Exemption 5 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), to communications between a government agency and outsiders not employed by a government agency is in conflict with the plain language of the FOIA and with numerous opinions of this Court requiring that FOIA exemptions be construed narrowly and that statutes be interpreted in accordance with the ordinary meaning of their terms. *Compare* Petition for a Writ of Certiorari at 8-14 with Respondents' Brief at 7-11.

Instead, respondents argue only that the courts of appeal that have addressed the question have "uniformly held" that records submitted by outside consultants that play essentially the same role in the agency's decisionmaking process as documents submitted by agency employees may be protected from disclosure under Exemption 5. Respondents' Brief, at 8.[1] Respondents' argument is substantively incorrect.

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1. It is noteworthy that this purported holding would not apply to the facts of this case. The document sought by petitioners was submitted to the independent Webster Commission from an agency, the Department of Justice, having no relationship (formal or otherwise) with the Commission.

As an initial matter, each of the cases cited by respondents comes from one of three federal circuits: the D.C. Circuit, the Fifth Circuit, or the Second Circuit. As discussed in the petition, the legal fiction known as the consultant corollary was created upon completely unsupported policy grounds in a three-sentence footnote appearing in a 1971 D.C. Circuit opinion. Pet. at 10 (discussing *Soucie*, 448 F.2d at 1078 n.44). During the 1970s, without providing any additional analysis, the Fifth and Second Circuit Courts of Appeal adopted the consultant corollary as it was formulated in *Soucie*. *See Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (quoting *Soucie*); *Lead Industries Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) ("we have nothing that can usefully be added to Chief Judge Bazelon's statement in *Soucie*"). Despite the lack of analysis in each case, and despite numerous subsequent decisions of this Court emphasizing that FOIA exemptions are to be construed narrowly, the consultant corollary has remained the law in these three circuits, resulting in denials of numerous meritorious FOIA requests.

By providing a substantively incorrect summary of the consultant corollary, respondents' brief itself demonstrates some of the confusion regarding the doctrine. Respondents assert on page 8 of their brief that documents received from outsiders that play the same role in an agency's decisionmaking process as documents submitted by agency employees are protected by Exemption 5. This view was rejected first by the Ninth Circuit in 1999 and then by this Court in 2001. *See Klamath Water Users Protective Assoc. v. Department of the Interior* (*Klamath I*), 189 F.3d 1034, 1038 (9th Cir. 1999) and *Department of the Interior v. Klamath Water Users Protective Assoc.* (*Klamath II*), 532 U.S. 1, 11-12 (2001).

When *Klamath I* was before the Ninth Circuit, based upon D.C. Circuit and Fifth Circuit precedent, the *dissenting* opinion reasoned that the primary consideration was the role the document sought played in the deliberative process, not the identity of the document's creator. *See Klamath I*, 189 F.3d at 1043-44 (Hawkins, J., dissenting). The majority disagreed, adopting a conflicting viewpoint. It held that even though the advice of certain Indian tribes was sought by the agency in question, because the tribes were not impartial actors, nothing they submitted could be protected from disclosure as a consultant's report even under the "expansive view" of Exemption 5's "inter-agency/intra-agency test." *Id.* at 1038. In a unanimous opinion, while expressly declining to rule on the validity of the consultant corollary, this Court affirmed the majority decision of the Ninth Circuit. *See Klamath II*, 532 U.S. at 10-12.

The confusion surrounding the consultant corollary is further evidenced by the instant case wherein the courts below were unable to agree as to how the corollary should be applied. The Court of Appeal for the Second Circuit held that the document sought by petitioners is protected from disclosure as an "inter-agency" memorandum after the District Court for the Southern District of New York held that the same document is an "intra-agency" memorandum. Pet. App. 16a, 38a.

Although this Court was not required in *Klamath II* to rule on the validity of the consultant corollary in order to hold that the documents sought in that case were not protected by Exemption 5, the Court discussed in detail the difference between "the most natural meaning" of the terms of the Exemption (advocated by petitioners) and "the more expansive reading" endorsed by respondents. *See Klamath*

II, 532 U.S. at 9-10, 12. Because the issue of whether communications with outsiders, including consultants' reports, are protected from public disclosure under FOIA Exemption 5 is the dispositive issue is this case, the issue is now ripe for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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